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ARMY CORPS OF ENGINEERS-ENVIRONMENTAL PROTECTION AGENCY MITIGATION POLICY MEMORANDUM OF AGREEMENT. A REVIEW

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Abstract: With the passing of the Federal Water Pollution Control Act Amendments of 1972 a tenuous relationship was established between the Army Corps of Engineers and the Environmental Protection Agency over administration of the section 404 dredge and fill permitting program. One major point of contention between the two agencies has been their philosophy on the role of mitigation in the permitting process. This disagreement has led to frustration not only for those seeking permits but also for personnel of both agencies.

To alleviate this problem, a recent memorandum of agreement outlining a comprehensive mitigation policy was approved by both agencies. This is the first time that the role of mitigation in permit applications has been formally addressed and should work to: 1) reduce delays in permit processing, 2) minimize ambiguity in the regulatory program, and 3) provide agency personnel with a clear understanding of the procedures for determining appropriate and practicable mitigation.

Key Words: Army Corps of Engineers; Environmental Protection Agency; Memorandum of Agreement; mitigation; section 404 permitting program.

INTRODUCTION

The Federal Water Pollution Control Act Amendments of 1972 (FWPCA) were enacted with the announced purpose of restoring and maintaining the biological, chemical, and physical integrity of the nation's waters (40 CFR 230.1[a]). The act established a number of goals, requirements, prohibitions, and programs to achieve this purpose while addressing the problems of water pollution using many different approaches. One approach was the establishment of the section 404 dredge and fill permitting program.

This program is administered by both the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), two agencies which have not always shared the same philosophy on permitting issues. One major point of contention between the Corps and EPA has been how to view the role of mitigation in the permitting process. In some instances the Corps has approved mitigation plans only to have the EPA overrule their decision, simply because both agencies were not following the same general policy towards mitigation. Nationwide this disagreement has lead to frustration not only for developers but also for personnel of both agencies.

In the following report, the new (February 1990) Memorandum of Agreement (MOA) between the Corps and the EPA on mitigation is reviewed. First though,

a look is taken at the involvement of the Corps in wetlands and the general mitigation policy for both agencies before the February 1990 agreement.

SECTION 404 AND THE CORPS

Section 404 of the FWPCA established a permit program administered by the Secretary of the Army, acting through the Chief of Engineers, to regulate discharge of dredged material and of those pollutants that comprise fill material into waters of the United States. Section 404 permit applications are evaluated using guidelines developed by the Administrator of the EPA in conjunction with the Secretary of the Army. Therefore, though permits are issued by the Corps, the program is overseen by the EPA.

The 404 permit program jurisdiction was originally limited by the Corps to the same waters that were being regulated by the Rivers and Harbors Act of 1899. This includes tidal waters and/or waters that are presently or in the past were used to transport interstate or foreign commerce (April 1974 regulations). This limitation was challenged by the Natural Resources Defence Council and the National Wildlife Federation (NRDC v. Callaway, 392 F. Supp. 685, 1975) as being inconsistent with Congress' intent to regulate "all waters of the United States," as expressed in the FWPCA's definition of "navigable waters." The court agreed with the NRDC et al. and ordered the revocation and recision of that part of the regulation "which limits the permit (§ 404) jurisdiction of the Corps by definition or otherwise to other than the waters of the United States." The Corps revised its regulations (published 25 July 1975) to include a phase-in schedule for requiring permits in an expanded jurisdiction so that on July 1, 1977 permits became required for discharges of dredged or fill material into all waters of the United States. The complete definition of "waters of the United States" is found in 33 CFR 328, and has been upheld in a number of cases considering what is included in "waters of the United States" within the scope of the FWPCA (United States v. Holland, 373 F. Supp. 665; United States v. P.F.Z. Properties, Inc., 393 F. Supp. 1370; Leslie Salt v. Froehlke, 403 F. Supp. 1292; Conservation Council of North Carolina v. Costanzo, 398 F. Supp. 653).

MITIGATION AND THE CORPS: PRE-MOA

The Corps' current responsibilities in the 404 permitting process place it in the unenviable position of trying to please the environmental factions working to protect wetlands on the one hand, and the developers working to alter wetlands on the other. Whereas the Corps was originally limited to protecting only navigation interest (Rivers and Harbors Act of 1899), today it must consider the full public interest in all "waters of the United States" (FWPCA of 1972). What is often overlooked by the environmental groups who value wetlands is that the Corps' charge in the 404 permitting process is to regulate and not prevent development in these waters.

In the Corps' consideration of the "public interest" during permit review, it examines both the beneficial and detrimental impacts of a project. The Corps will not issue a permit for a project it determines to be contrary to the public interest. In a majority of applications the permit is conditioned to require mitigation in order to tip the "public interest balance" so that the proposed project is no longer

contrary to the public interest (Barrows, 1986). These conditions must be "directly related to the impacts of the proposal, appropriate to the scope and degree of anticipated impacts, and reasonably enforceable" (Barrows, 1986). Likewise, mitigation will not be required beyond what is necessary to make the issuance of a permit no longer contrary to the public interest.

When considering mitigation, the Corps is guided by the Council on Environmental Quality's (CEQ) five part definition: avoiding, minimizing, rectifying, reducing or eliminating, and compensating for impacts (40 CFR 1508.20). The Corps considers mitigation throughout the public interest review process and not necessarily in the stepwise order of the CEQ definition. The Corps finds no mandate requiring otherwise in either the CEQ regulations or § 404 (b)(1) guidelines (33 USC §1344). As discussed in the next section, this is a major point of disagreement between the Corps and EPA.

Usually, the District Engineer is responsible for determining the type and extent of mitigation included as conditions to a permit. Before the final determination, the District Engineer will receive comments from state and federal agencies along with the general public. These comments and recommendations are used to help calculate losses and figure mitigation needs. Deciding upon the appropriate mitigation is difficult and the District Engineer will use all available information, though when dealing with issues of scientific uncertainty such as wetland creation, he must ultimately rely upon his best professional judgement. Finally, the Corps feels that it "must be objective and open-minded in its permit decisions and its approach to mitigation if it is to remain an honest broker for the public interest" (Barrows, 1986).

MITIGATION AND THE EPA: PRE-MOA

The EPA also follows the CEQ's definition of mitigation, but in contrast to the Corps, it considers the order of the five elements of the definition to represent the desired sequence of steps in the mitigation planning process (40 CFR 230.5). The EPA feels that the CEQ's definition and inherent sequence of steps complements requirements set forth in the §404 (b)(1) guidelines (40 CFR 230) which are the cornerstones for acceptability of proposed actions under §404 (Clupek, 1986).

According to the EPA, the guidelines require that: 1) No discharge is permitted when a practicable, less damaging alternative exists (40 CFR 230.10[a]); 2) All appropriate and practicable steps to minimize potential adverse impacts be taken (40 CFR 230.10[d]); and 3) Unavoidable impacts should be mitigated through compensation techniques such as enhancement of existing or creations of new wetlands. Essentially EPA views mitigation as a protection measure first (avoiding or minimizing impacts) and only secondarily in its compensatory form. Though they recognize that compensatory mitigation can provide a unique opportunity to mitigate for environmental impacts, because of the scientific uncertainty associated with the success of man-made wetlands, it is only appropriated in cases where the natural wetland loss is unavoidable (Clupek, 1986).

THE CORPS-EPA MEMORANDUM OF AGREEMENT

On 7 February 1990, the Corps-EPA Memorandum of Agreement (MOA) concerning the type and level of mitigation necessary to demonstrate compliance

with the regulatory guidelines for discharges of dredged or fill material under §404 (b)(1) of the FWPCA took effect. The MOA was developed to answer questions about the mitigation requirements under §404 permit review guidelines (Guidelines). Its intent is to improve consistency in the implementation of the Guidelines and to eliminate misunderstandings and confusion on the part of agency personnel.

The MOA should help: 1) reduce delays in permit processing, 2) minimize ambiguity in the regulatory program and, 3) provide agency personnel with a clear understanding of the procedures for determining appropriate and practicable mitigation. It will do this not by changing regulatory requirements, but by providing a procedural framework for considering mitigation so that consistent determinations of the type and level of mitigation necessary to ensure compliance with the Guidelines can be made.

General Policy Statement

The general policy for mitigation set forth in the MOA is as follows. First, all waters of the United States will be accorded the full measure of pretection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation is "appropriate" is based solely on the values and functions of the aquatic resource that will be impacted, while "practicable" means "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes" (33 CFR 230.3[q]).

Second, based on the objectives of the FWPCA and the Guidelines to restore and maintain existing aquatic resources, the Corps will strive to achieve a goal of no overall net loss of values and functions of wetlands. Even so, this no net loss doctrine does not have to be strictly followed by individual permits so that, in cases where the "appropriate" mitigation is not "practicable," this goal may not be achieved. Currently, The Domestic Policy Council through its Inter-Agency Task Force on Wetlands is developing recommendations on how to attain this goal of no net wetland loss. This may lead to a change in the current §404 regulatory program which does not include a no net loss policy.

Third, though the five types of mitigation enumerated in the CEQ's definition (40 CFR 1508.20; Appendix I) are compatible with the requirements of the Guidelines, they may be combined to form three general types: avoidance, minimization and compensatory mitigation. This sequence outlines the basic steps to be taken when reviewing mitigation in permits: 1) determine that potential impacts have been avoided to the maximum extent practicable, 2) require steps to minimize unavoidable impacts, and 3) compensate for lost aquatic resource values. This sequence may be deviated from when both the Corps and the EPA agree that the proposed discharge is necessary to avoid environmental harm, or the proposed discharge can reasonably be expected to result in environmental gain or insignificant environmental losses.

The Sequence for Mitigation Review

Avoidance.—Section 230.10(a) of the Guidelines "allows permit issuance for only the least environmentally damaging practicable alternative." Specifically it disallows discharges if there is a practicable alternative which would have a less adverse impact on the aquatic ecosystem so long as the alternative does not have

other significant adverse environmental consequences. Under § 230.10(a) compensatory mitigation may not be considered as a method to reduce environmental impacts when evaluating the least environmentally damaging practicable alternatives.

Minimization.—Minimization aspects of mitigation are covered in § 230.10(d) of the Guidelines. Simply stated, appropriate and practicable steps to minimize the adverse impacts may be required through project modifications and permit conditions.

Compensating.—In general, appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. In-kind mitigation is preferable to out-of-kind because, in determining mitigation, the primary objective is to replace the functional value lost by the impacted resource. Therefore, restoration should be the first option considered. Not only are the lost values more directly replaced, but the success of restoration projects is better, and impacts to potentially valuable uplands reduced. Otherwise, one type of environment with its specific values will be destroyed to create another.

If restoration is not an alternative, on-site creation in areas adjacent or contiguous to the impacted area should next be explored. If this is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area. This means in close physical proximity and to the extent possible, the same watershed as the impacted site.

"Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank" (MOA, section II.C.3). Though stated that it may be used only under "exceptional" circumstances, if a mitigation bank is approved by the Corps and the EPA, it is considered to be equivalent to any other form of compensatory mitigation regardless of the practicability of the other forms. Additional guidelines are being developed to cover this type of compensatory mitigation.

When it is decided that impacts are unavoidable and a compensatory form of mitigation must be used, the objective of the mitigation should be to offset environmental losses. Generally, in the absence of definitive information on the wetland functions and values of the site, a 1 to 1 acreage replacement standard will be used. However, where the functions and values of the replacement wetlands are demonstratedly lower than the original wetland, the ratio may be higher and conversely, where the functional values and probability of success of the replacement wetland are demonstratedly higher, the ratio may be lower than 1 to 1 replacement. Finally, compensatory mitigation required by another agency may be considered in evaluating a Corps permit, but avoidance and minimization should still be sought.

Final Points

Authorization for the addition of mitigation requirements to Corps permits is found in 33 CFR 325.4(a). This section ensures legal enforceability of the mitigation conditions and therefore enhances the level of compliance. A permit will be denied if the mitigation conditions necessary to ensure compliance with the Guidelines are not reasonably implementable or enforceable.

This MOA is the result of five years of talks between the Corps and the EPA. It is the first time that they have addressed formally and publicly how they will consider permit applications. The agreement should result in more prompt permit reviews and decisions while reducing the chance of disagreement between the Corps and the EPA on approval or denial of a project.

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